

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD COLON CHRIVIA,

Plaintiff-Appellant,

v

BARBARA ANN CHRIVIA,

Defendant-Appellee.

UNPUBLISHED

March 18, 2010

No. 293702

Lapeer Circuit Court

Family Division

LC No. 04-034925-DM

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right an order of the trial court denying his motion to change custody. The Lapeer Circuit Court, on de novo review, agreed with the Friend of the Court (FOC) referee's findings and entered an order consistent with the findings. Finding no error, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant married in 1989 and divorced in 2004. The marriage produced one child, Joshua, born in 2000. The parties entered into a consent judgment of divorce that granted both parents joint legal and joint physical custody of Joshua. In 2007, defendant, concerned over plaintiff's imminent move to West Virginia, sought sole physical custody. Defendant was instead granted primary physical custody, and plaintiff was granted permission to move to West Virginia.

In January of 2009, while Joshua was with plaintiff in West Virginia, plaintiff sought and received in the courts of West Virginia an emergency protective order and temporary custody of Joshua. Meanwhile, defendant filed a motion in the Lapeer Circuit Court for Joshua's return. The trial court informed plaintiff that the temporary custody granted by West Virginia was without effect and that he was required to return Joshua to defendant, and attend a hearing in the Lapeer Circuit Court. Plaintiff complied, and on the date of the hearing filed a motion for change of custody in that court.

In June of 2009, the FOC referee heard plaintiff's motion, taking testimony from plaintiff, defendant, and plaintiff's wife. The referee also interviewed Joshua *in camera*. The referee recommended that plaintiff's motion be denied, and made findings of fact on the record. Plaintiff filed his objections before the trial court. The trial court reviewed the transcript and the pleadings, and agreed with the referee and entered an order denying plaintiff's motion.

Plaintiff's sole argument on appeal is that the trial court abused its discretion in denying plaintiff's motion in light of the following facts: (1) plaintiff is married and has a stable home, while defendant has had two live-in boyfriends she met on the internet; (2) plaintiff has a higher income than defendant; (3) defendant was previously unaware of Joshua's Asperger syndrome¹ diagnosis. We affirm all orders and judgments of the trial court in child custody cases unless the court "made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Brown v Loveman*, 260 Mich App 576, 591-592; 680 NW2d 432 (2004).

The first step in deciding a motion for change of custody is determining whether proper cause or change of circumstances merits such a change. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008). The party seeking the change bears the burden of establishing this by a preponderance of the evidence. MCL 722.27(1)(c). The FOC referee found that defendant having two live-in boyfriends in the space of two and a half years was both a sufficient change of circumstances and a proper cause to allow a change of custody. Plaintiff does not contest this finding on appeal. Nor does the finding appear to be a palpable abuse of discretion, as the adults with whom a child lives have or can have a significant effect on that child's well-being and development.

The next inquiry is whether there is an established custodial environment. *Powery*, 278 Mich App at 528. Plaintiff concedes that an established custodial environment exists with defendant. The referee did not rely on plaintiff's concession, but found that there was an established custodial environment based on the length of time defendant had primary physical custody. This finding is not against the great weight of the evidence. See *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

Having established that there is proper cause or a change in circumstances, and that there is an established custodial environment, what remains to examine is whether plaintiff established by clear and convincing evidence that the change in custody is in the best interest of Joshua. *Powery*, 278 Mich App at 528. The Legislature has enumerated the following 12 factors to be considered when making the best interest determination:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and

¹ Asperger syndrome is a developmental disorder characterized by low social ability but normal linguistic and cognitive function (DSM-IV-TR). It is often considered a form of or similar to high-functioning autism.

permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

While the best interest factors must be considered, a trial court need not give each factor equal weight. *Pierron v Pierron*, 282 Mich App 222, 261; 765 NW2d 345 (2009).

It appears as though plaintiff's arguments are aimed at best interest factors (c), (d), (e), and (f). The referee explained that plaintiff prevailed on factor (c) due to his higher income, but noted that both parties were "struggling," and that neither party was "suffering." Because the disparity in income was not dramatic, the referee did not give it great weight. With respect to factors (d) and (e), the referee expressed concerns about defendant's two live-in boyfriends. The trial court agreed that there were "certainly legitimate concerns about the Defendant's lifestyle and her manner of involvement of male companions in the child's life." The referee's and the trial court's concerns on the impact of defendant's decision to have her boyfriends live in the home with Joshua does impact the stability and prospects for stability of the home. Thus, there was no error in the handling of these factors below.

The referee found that the parties were equal with respect to factor (f), specifically rejecting plaintiff's argument that cohabitation outside of marriage was per se immoral under case law. See *Truitt v Truitt*, 172 Mich App 38, 46; 431 NW2d 454 (1988)). It was not clear legal error for the trial court to reject plaintiff's argument; rather, it would have been clear legal error for it to accept plaintiff's argument.

In sum, the referee considered all of the statutory factors, weighed them, and found that the factor on which defendant prevailed outweighed the two factors on which plaintiff prevailed. The trial court, reviewing the testimony, came to the same conclusion. We find no palpable abuse of discretion in the trial court's balancing of the best interest factors, and in finding that plaintiff failed to prove by clear and convincing evidence that it was in Joshua's best interest to grant plaintiff's motion for change of custody.

Affirmed.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood